



BALLOT**PEDIA**

# JUDICIAL DEFERENCE

**UNDERSTANDING THE PRINCIPLE OF  
JUDICIAL REVIEW**

September 2024

# Judicial deference: Understanding the principles of judicial review

## Summary

The term deference refers to the administrative law principle by which courts are expected to defer to an administrative agency's interpretation of a statute or regulation when the legislative language is silent or ambiguous. Deference is widely regarded as a major factor in the expansion of administrative agency powers.

This document guides you through the history, and application of deference.

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# Judicial deference: What is deference in the context of the administrative state?

## Deference in action

Deference applies in cases of judicial review, e.g., when a plaintiff accuses an agency of unlawful action. In such cases, the court must decide whether the agency action in question was authorized.

Since Congress often passes broad legislation that requires agencies to fill in the details of rule making and enforcement, the degree of agency interpretation is a direct function of lawmakers' imprecision in crafting statutory language.

### Example: *City of Arlington v. FCC*

*City of Arlington, Texas v. Federal Communications Commission (FCC)* was a 2013 United States Supreme Court case that questioned whether courts should defer to an agency's interpretation of the extent of its own authority under a particular statute. The case questioned whether the Federal Communications Commission (FCC) had the legal authority to set time limits for local entities to approve zoning requests under the Communications Act of 1934. Plaintiffs argued that the statute did not explicitly authorize the agency to set time limits, while the FCC claimed that it had crafted a reasonable interpretation of an ambiguous provision of the Act. The court ultimately deferred to the FCC's interpretation of the Act, arguing that the power to set time limits fell within the agency's jurisdiction.

## Types of deference

The United States Supreme Court has developed several forms of deference in reviewing agency actions throughout history, including *Chevron* deference, *Skidmore* deference, and *Auer* deference. Let's take a closer look at each of these deference doctrines:

**Chevron deference:** The *Chevron* doctrine was named for the 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in which the United States Supreme Court established the legal test to determine whether a court should defer to an agency's reasonable interpretation of an ambiguous statute. Under *Chevron*, courts were expected to refrain from imposing their own statutory interpretation unless the agency's interpretation was determined to be unreasonable. The Supreme Court ruled to overturn *Chevron* on June 28, 2024, in *Loper Bright Enterprises v. Raimondo*, holding that federal courts may not defer to an agency's interpretation of an ambiguous statute.

**Skidmore deference:** The *Skidmore* doctrine applies when a federal court yields to a federal agency's interpretation of a statute administered by the agency according to the agency's ability to demonstrate persuasive reasoning. *Skidmore* deference allows a federal court to determine the appropriate level of deference for each case based on the agency's ability to support its position. The United States Supreme Court developed *Skidmore* deference in the 2000 case *Christensen v. Harris County* and named the doctrine for the court's 1944 decision in *Skidmore v. Swift & Co.*

**Auer deference:** A federal court applies *Auer* deference, also known as Seminole Rock deference, when it yields to an agency's interpretation of an ambiguous regulation that the agency itself has promulgated. In order for a court to apply *Auer* deference, the underlying statute must be unclear and the agency's interpretation must be deemed reasonable. The United States Supreme Court first described the underlying rationale for *Auer* deference in the 1945 case *Bowles v. Seminole Rock & Sand Co.* The court went on to develop and implement the deference principle in the 1997 case *Auer v. Robbins.*

## Arguments for and against judicial deference

### Deference and agencies

Supporters of deference claim that deference prevents non-expert judges from interfering with agency policy, which is crafted by staff who are presumed to be experts in their field. Supporters also claim that deference grants agencies more flexibility to solve problems; that chaos would ensue if courts were less deferential. Opponents argue that deference contributes to the expansion of agency powers by concentrating unchecked lawmaking power in agencies and facilitating what D.C. Circuit Judge Neomi Rao refers to as administrative collusion, which rewards agencies for working with individual members of Congress to further the expansion of agency powers through delegation.

### Deference and delegation

Supporters of deference maintain that courts should defer to agency interpretations of unclear statutes because Congress has delegated the authority to interpret and implement the law to agencies. Opponents of deference argue that deference violates the nondelegation doctrine, creates a bias in favor of agencies, and prevents judicial review of agency actions.

### Deference and the separation of powers

Deference supporters claim that the separation of powers—the distribution of government authority between the three branches—requires deference when the resolution of ambiguous statutes requires policy judgments. Since policy judgments are political questions, the argument follows, they must be resolved by the political branches (Congress and the president) rather than the courts. Deference opponents argue that deference violates the separation of powers by preventing the judicial branch from exercising independent judgement when interpreting statutes, transferring judicial power to the executive branch, and ignoring the judicial obligation to serve as a check on the political branches.

## Deference and legal precedents

Deference supporters contend that deference principles are supported by legal precedents demonstrating that courts have long accepted reasonable executive interpretations of statutes. Supporters of this argument also claim that the Administrative Procedure Act (APA), which governs agency procedures, allows for deference as part of judicial review. Opponents argue that deference breaks with both United States Supreme Court precedent, which favored de novo judicial review, and the APA, which calls for courts to decide relevant questions of law.

## Deference in the states and the future of deference

### Deference in the states

At least thirty-five states have implemented forms of judicial deference to state administrative agencies similar to the federal deference doctrines discussed in the earlier installments. The following five states, however, have taken steps to limit or eliminate deference:

- **Idaho:** Governor Brad Little (R) in March 2024 signed a bill into law to end judicial deference practices in the state.
- **Nebraska:** Governor Jim Pillen (R) in March 2024 signed a bill into law to end judicial deference practices in the state.
- **Indiana:** Governor Eric Holcomb (R) in March 2024 signed a bill into law to end judicial deference practices in the state.
- **Ohio:** The Ohio Supreme Court issued a decision in December 2022 that ended applications of Chevron deference in the state. The state court also issued a decision in October 2023 ending Auer deference in the state.
- **Tennessee:** Governor Bill Lee (R) in April 2022 signed a bill ending judicial deference practices in the state.
- **Colorado:** The Colorado Supreme Court issued a decision in June 2021 that narrowed applications of Brand X deference and Chevron deference practices in the state.
- **Arkansas:** The Arkansas Supreme Court issued a decision in April 2020 that ended Chevron deference in the state.
- **Wisconsin:** The Wisconsin Legislature in December 2018 codified the intent of a Wisconsin Supreme Court decision that eliminated *Chevron* deference in the state.
- **Florida:** Voters in Florida approved a ballot measure in November 2018 that prohibited courts from deferring to state agency interpretations of rules in legal cases.
- **Mississippi:** The Mississippi Supreme Court issued a decision in June 2018 that ended Chevron deference in the state. The state court also issued a decision in June 2021 that ended Auer deference in the state.
- **Arizona:** Governor Doug Ducey (R) signed legislation into law in April 2018 requiring state courts to decide all questions of law without deference to government agencies.
- **Michigan:** The Michigan Supreme Court issued a decision in July 2008 that ended judicial deference to state agencies.

## Deference reform proposals

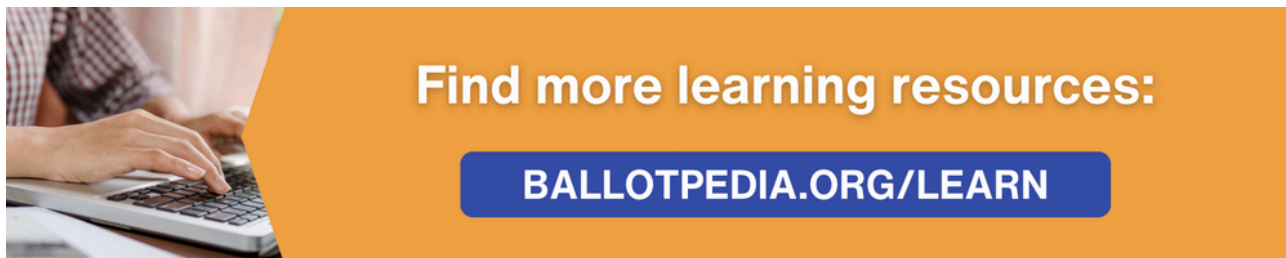
Administrative law scholars and government officials have proposed various approaches to reforming deference. The following is a selection of reform proposals:

- **Legislative approaches:** The Separation of Powers Restoration Act (SOPRA) and the Regulatory Accountability Act (RAA) are two legislative proposals that would limit or eliminate judicial deference to agencies in cases where there is a dispute about the meaning of a statute or regulation.
- **Judicial approaches:** The United States Supreme Court overturned *Chevron* deference in June 2024, which had been a common reform proposal leading up to the Supreme Court case. The court could also narrow the scope of *Auer* deference to limit the ability of judges to defer to agencies' interpretations of their own regulations.
- **Executive approaches:** The executive branch could instruct agencies to use cost-benefit analysis when issuing new regulations. Paul R. Noe, a former Office of Information and Regulatory Affairs (OIRA) staff member during the George W. Bush administration, suggested that the next president could direct “agencies, including independent agencies, to reexamine their statutory interpretations ... and, 'unless prohibited by law,' implement those statutes through cost-benefit balancing.”

## Continued reading on deference:

- [Deference](#)
- [\*City of Arlington v. FCC\*](#)
- [\*Chevron\* deference](#)
- [\*Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.\*](#)
- [\*Loper Bright Enterprises v. Raimondo\*](#)
- [\*Skidmore\* deference](#)
- [\*Christensen v. Harris County\*](#)
- [\*Skidmore v. Swift & Co.\*](#)
- [\*Auer\* deference](#)
- [\*Bowles v. Seminole Rock & Sand Co.\*](#)
- [\*Auer v. Robbins\*](#)
- [Separation of powers](#)
- [Taxonomy of arguments about judicial deference](#)
- [State responses to judicial deference](#)
- [Reform proposals related to judicial deference](#)
- ["Judicial Deference to Administrative Interpretations of Law" by Antonin Scalia \(1989\)](#)
- ["The Origins of Judicial Deference to Executive Interpretation" by Aditya Bamzai \(2017\)](#)





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